STATE OF ILLINOIS
SUPREME COURT

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the twelfth day of November, 2001.

Present: Moses W. Harrison II, Chief Justice
Justice Charles E. Freeman — Justice Mary Ann G. McMorrow
Justice Thomas R. Fitzgerald — Justice Robert R. Thomas
Justice Thomas L. Kilbride — Justice Rita B. Garman

On the fifth day of December, 2001, the Supreme Court entered the following judgment:

No. 92483 — Petition for Leave to Appeal from Appellate Court First District
1-00-1973 1-00-1979 93L50663

Milwaukee Safeguard Insurance Company, Alpha Property and Casualty Insurance Company, Milwaukee Mutual Insurance Company, Milwaukee Casualty Insurance Co., National American Insurance Company, Northwestern National Casualty Company, Vasa North Atlantic Insurance Company, Sentry Life Insurance Company, Dairyland Insurance Company, Sentry Insurance A Mutual Company, Liberty Mutual Fire Insurance Company, Liberty Life Assurance Company of Boston, Liberty Insurance Corporation, Liberty Mutual Insurance Company, Albany Insurance Company, Atlas Assurance Company of America, Utica Mutual Insurance Company, Graphic Arts Mutual Insurance Company, Cuna Mutual Insurance Society, Cumis Insurance Society, Inc., Fortis Insurance Company, Mutual Service Casualty Insurance Company, Auto-Owners Insurance Company, Owners Insurance Company, American Family Mutual Insurance Company, American Standard Insurance Company of Wisconsin, Mortgage Guaranty

Insurance Corporation, Wisconsin Mortgage Assurance Corporation, Travelers Casualty & Surety Company, Travelers Casualty Surety Company of America, Travelers Commercial Insurance Company, The Automobile Insurance Company of Hartford, Connecticut, Farmington Casualty Company, The Phoenix Insurance Company, The Travelers Home and Marine Insurance Company, The Travelers Indemnity Company, The Travelers Life and Annuity Company, The Travelers Indemnity Company of Connecticut, The Standard Fire Insurance Company, The Charter Oak Fire Insurance Company, Travelers Casualty Company of Connecticut, Church Mutual Insurance Company, West Bend Mutual Insurance Company, Royal Maccabees Life Insurance Company, Motors Insurance Corporation, CIM Insurance Corporation, MIC Property and Casualty Insurance Corporation, MIC Life Insurance Corporation, MIC General Insurance Corporation, National General Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Life Insurance Company, Nationwide General Insurance Company, Nationwide Mutual Insurance Co., Nationwide Property & Casualty Insurance Company, National Casualty Company, Wausau Underwriters Insurance Co., Employers Insurance of Wausau A Mutual Company, American Economy Insurance Company, American States Life Insurance Company, American States Insurance Company, American States Preferred Insurance Company, Employers Health Insurance Company, American Continental Insurance Company, American Continental Life Insurance Company, and Pharmacists Mutual Insurance Company,

Petitioners

v.

Stephen F. Selcke, Director, the Department of Insurance, and Patrick Quinn, Treasurer of the State of Illinois,

Respondents

The Court having considered the Petition for leave to appeal and being fully advised of the premises, the Petition for leave to appeal is DENIED.

As Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order entered in this case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court, this sixteenth day of January, 2002.

/s/ Juleann Hornyak

Clerk,
Supreme Court of the State of Illinois

No. 9 3 1 1 4 0

In The
Supreme Court of the United States
October Term, 1993

JAMES B. BEAM DISTILLING CO.,
Petitioner,

v.

STATE OF GEORGIA; JOE FRANK HARRIS, individually; ZELL MILLER, individually and as Governor of the State of Georgia; MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner; and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,
Respondents.

On Petition for Writ of Certiorari
To The Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

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pursuant to a statute subsequently declared unconstitutional," *Beam (Ga. II)* Appendix A, p. A2, n.3 (emphasis supplied), the Georgia court could then assert its "standing" defense to the Petitioner's refund application under the Refund Statute. Perhaps the Georgia court hoped that this Court would then believe that Georgia provides a post-deprivation refund remedy for the collection of unconstitutional taxes, but that the Petitioner simply does not have standing under Georgia law to pursue the post-deprivation remedy. The Respondents herein could then argue that the constitutional due process threshold is nevertheless met because the refund remedy ostensibly exists.

Denial of a remedy to the Petitioner based upon the supposed standing defense violates the Due Process Clause, even assuming (contrary to fact) that the Georgia courts would otherwise grant the Petitioner relief under the Refund Statute. This is so because, as discussed above, the unconstitutional Commerce Clause injury, in the form of discrimination, is inflicted upon the Petitioner even though, indeed because, the Petitioner passed on the "cost" of the tax by invoicing it to the Petitioner's wholesalers. This very pass-on results in the comparative disadvantage suffered by Petitioner's product when the Petitioner's product is marketed. *McKesson*, 110 S. Ct. at 2255-57. "To whatever extent petitioner succeeded in passing on the economic incidence of the tax through higher prices to its customers, it most likely lost sales to the favored distributers or else incurred other costs (*e.g.*, for advertising) in an effort to maintain its market share." *Id.* at 2256. This result, which goes right to the heart of the Commerce Clause violation, actually confers standing on the Petitioner under this Court's due process jurisprudence.

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Second, Beam relies heavily upon *McKesson Corp. v. Florida Alcoholic Beverages & Tobacco Division*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1989), asserting that *McKesson* requires a refund as a matter of federal due process. However, *McKesson* involved a *post-Bacchus* State statute which violated "clearly established law" and a State lacking an adequate predeprivation remedy. Under *McKesson*, due process is satisfied by the existence of a predeprivation remedy.[3] *Cambridge State Bank v. James*, 480 N.W.2d 647 (Minn. 1992). Since Georgia provides alcohol taxpayers and licensees with sufficient opportunity to challenge a tax or State action prior to payment or enforcement, *McKesson* does not require a tax refund here under federal due process, especially for amounts already recouped by Beam. Alternatively, even the United States Supreme Court in *McKesson* seemed to indicate that if the facts establish a pass-on and the state law includes a comparable defense, no refund need be granted. 496 U.S. at 49, n.34, 110 S.Ct. at 2257, n.34, 110 L.Ed.2d at 43-44, n.34 (1989).

Third, the outcome here is now required by the Georgia Supreme Court's recent decision in *Recich v. Collins, et al.*, Case Nos. S92A00621 and S92A0622, ___ Ga. ___, ___

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[3] Among many other valid predeprivation remedies, the State stresses that plaintiff Beam could obtain injunctive relief prior to paying the tax. Since Beam immediately passes the tax on to the wholesalers and the State has a pass-on defense to any remedy at law, this arguably creates the necessary prerequisite for an injunction, to-wit: lack of an adequate remedy at law. The State's pass-on defense arguably creates a catch 22 position for the taxpayer and ameliorates the taxpayer's otherwise adequate remedy at law under the tax refund statute.

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